No. 11633

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S REPLY BRIEF

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MONTANA STANDARD, PRINT

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CASES CITED BY APPELLEE.

Appellee in her brief cites twenty-three cases in support of her contentions in this action. Many of those cases relate to matters which Appellant will concede. In this reply brief Appellant will attempt to simplify the argument and reduce it to the consideration of those cases which are urged in support of rules which it does not concede.

Appellant is willing to urge the reversal of this case on the sole ground that the Butte Copper and Zinc Company was not liable for any damages resulting from the operation of the Emma Mine by the Anaconda Copper Mining Company under its lease. With this concession, further consideration of the

cases of Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th), 75 Fed. (2d) 79, U. S. v. Los Angeles Soap Co. (C. C. A. 9th), 83 Fed. (2d) 875, and Western Nat'l Ins. Co. v. LeClare (C. C. A. 9th), ... Fed. (2d) ....., dec. Aug. 13, 1947, is unnecessary.

Appellant concedes that in a diversity of citizenship case the Federal Court must follow the statutes and decisions of the highest court of the state in which it sits. This concession eliminates any further consideration of Erie Railroad Company v. Tompkins, 304 U. S. 64, Jones v. Weaver, 123 Fed. (2d) 403, Sears-Roebuck v. Marhenke, 121 Fed. (2d) 599, and Stoner v. New York Life Ins. Co., 311 U. S. 336, 61 S. Ct. 336, 85 Law Ed. 284.

The right to lateral and subjacent support as set forth in Catron v. South Butte Mining Co. (C. C. A. 9th), 181 Fed. 941, and in Section 6773 of the Revised Codes of Montana of 1935, is also conceded.

Appellant will also concede that where the owner of a mining claim leases the same for the express purpose of removing the pillars and all supports of the surface ground and collects royalty on the material so obtained, the lessor as well as the lessee is liable. In other words, Appellant concedes the correctness of the rulings in Campbell v. Louisville Coal Co., (Colo.) 89 Pac. 767, Nisbet v. Lofton, (Ky.) 277 S. W. 828, and Republic Iron & Steel Co. v. Barter, (Ala.) 118 So. 749. The Campbell and Nisbet cases above cited are referred to in Appellant's original brief on page twenty-eight. The Iron & Steel Co. case is referred to on page 25.

Benton v. Kernan, (N. J.) 13 Atl. (2d) 825, and

Benton v. Kernan, (N. J. E.) 21 Atl. (2d) 755, and Fagan v. Silver, 57 Mont. 427, 188 Pac. 900, relate to injunctions against the continuance of nuisances resulting from the operation of stone quarries in populous neighborhoods. In the Kernan cases the owner and the lessee were both enjoined from the operation of a plant which necessarily constituted a nuisance. The case of Fagan v. Silver is cited by Appellee as the leading case in Montana on the subject of lessor's liability. Silver owned a quarry, equipped it with machinery and crushed rock for his own use, and in doing so created a nuisance. Silver later turned the operation of the plant over to one Mackey and paid him so much a ton for the rock crushed and placed in bins for Silver's benefit. There is nothing in the case to show that Mackey was a lessee, or even an independent contractor. The statement in Appellee's brief that the owner and the *lessee* were enjoined from the operation of the stone quarry is not based upon any fact in the case and assumes a relationship which did not exist. There is no record of any agreement as to the manner in which Mackey would conduct his operation, or that he had a lease, or that he was an independent contractor, nor what if any control Silver retained over the operation. As far as the record goes, there is nothing to show he was not merely an employee of Silver, the amount of his compensation being dependent upon the number of yards of crushed rock which he produced and processed for Silver's use and benefit in an operation which constituted a nuisance.

Appellee seems to rely upon certain rules set forth

in this case as the basis upon which to hold that Appellant, as lessor of the Emma Mine, should be liable for the operations of the lessee. From that case she quotes the two following paragraphs:

> "'If we consider the facts as applying to the relation of landlord and tenant, appellant cannot escape liability, for the following rules would apply: 'One who erects a nuisance on his premises cannot escape liability by leasing the same, and his liability extends to the continuance of the nuisance after the lease goes into effect.' (29 Cyc. 1202; Anderson v. Dickie, 26 How. Pr. (N. Y.) 105; Robinson v. Smith, 53 Hun. 638, 7 N. Y. Supp. 38; McCarrier v. Hollister, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862.)
>
> "'''Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise.' (Jones on Landlord & Tenant, sec. 603.)"

(Appellee's Brief, p. 5.)

These rules relied on by Appellee are so obviously inapplicable to the present case as to hardly merit discussion. In the first place, they pertain to a nuisance created by the lessor. In the second place, they cite the rule that the lessor is liable only if he first created a nuisance and then demised the premises with the nuisance upon them with the intent of continuing the nuisance through a lessee and re-

ceiving benefits from its continuance. In our present case there is no allegation nor proof of any nuisance. Even if we assume that the operation of the Emma Mine constituted a nuisance such nuisance was not created by the lessor and did not come into existence until after the last of several leases was given to the Anaconda Copper Mining Company by Appellant (R. 45). The last of the several leases entered into by lessor was dated June 24, 1940, whereas the first evidence of any subsidence in the entire area in the vicinity of the Emma Mine was noticed by the Anaconda Copper Mining Company's Chief Engineer, Mr. O'Kelly, in 1941 (R. 293).

Appellee's brief also cites the case of Holter Hardware Company v. Western Mortgage Company, 51 Mont. 94, 149 Pac. 489. She makes the incorrect statement that in that case the Supreme Court of Montana rejected the contention of defendant that there was no liability upon the owner of the premises because the negligence, if any, was that of an independent contractor. In that case the owner of the building entered into a contract to replace sheets of iron in a skylight with glass. The independent contractor did this, but left the sheets of iron upon the roof where they were subsequently blown off and damaged plaintiff's property. The Court specifically held that as there was no contract to remove the debris from the roof, the independent contractor had no duty to remove the same, but that the duty became that of the owner. Thus, in effect the court holds that the negligence was that of the owner and not the independent contractor. This case also held that

the owner in arranging to have repairs made that would probably result in creating a condition dangerous to neighboring property owners was under obligation to provide that reasonable care should be taken to obviate the probable consequences of his act. Thus this case is not in point, as it involves an independent contractor and not a lessee. Furthermore, it involves a contract for the performance of an act which was foreseeably dangerous to the property of third parties. In our case the Emma Mine had been operated by the lessee, Anaconda Copper Mining Company, from 1917 to 1941 without damage to any person's property.

Ahlquist v. Mulvaney Realty Co., 116 Mont. 6, 152 Pac. (2d) 137, and Mitchell v. Thomas, 91 Mont. 370, 8 Pac. (2d) 639, both were cases wherein the owner of property was held liable for injuries to third persons caused by defects in the property.

In the Ahlquist case the defendant leased the premises and facilities with the knowledge that they were to be used for a public use and agreed to maintain these facilities in a safe condition. This it failed to do and it therefore violated its duty to the injured invitee.

In the Mitchell case the defendant-lessor was held liable in damages to a third party resulting from his failure to repair a coalhole which he had placed in the sidewalk adjacent to premises leased by him. The court held that he was liable for such damages, having had actual knowledge of the condition, having been warned by his tenant, by the city engineer and by policemen to repair the defects in the sidewalk and having promised but failed to do so. The court

also recognized that if the entire premises were leased, the weight of authority would have held that the landlord was not liable as he would have no right to enter and make repairs, but here the landlord had retained part of the building and had a duty to keep the sidewalk repaired.

Belcher Lumber Co. v. Woodstock Land & Mineral Co., (Ala.) 15 So. (2d) 625, is an action of trespass and trover against the owner of property which supplied another with machinery and finances to enter its property and engage in mining, but did not inform him of the boundaries of its property. However, ore was taken from adjoining property. This was a case of stealing ore and the court found that the defendant had knowledge of the acts of the persons who did the mining and received royalties on the stolen ore. Under those conditions the defendant was held to be liable. Appellant agrees that you cannot accept the fruits of stolen ore from a lessee with knowledge that it was stolen and escape liability on the ground you are a lessor.

Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, is an action against a city which in excavating for a sewer underneath a street removed quicksand from under plaintiff's land and caused damage. The city was held liable even though the work was done by an independent contractor because the specified work necessarily resulted in damage to plaintiff, and the city knew or should have known that it would do so. The case of Railroad Co. v. Morey, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, is one where the Railroad Company caused a ditch

to be dug across a street and left it unguarded. Plaintiff fell into the ditch and was injured. This case is merely illustrative of the general rule that where one excavates or places an obstruction in a street or highway he cannot escape liability by having the work done by an independent contractor. In other words, it illustrates the exception to the rule that one is not liable for injuries caused by work of an independent contractor. The rule stated by the court in the two cases last cited is the general rule, but it has no application to the case under consideration.

Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805, is an action for damages resulting from surface excavation. The defendant, Pincus, excavated for a building adjoining premises occupied by the plaintiff. He gave notice of such excavation to the owner of the adjacent lot and the owner employed the same contractor who was working for Pincus to support the ground under plaintiff's building. The building collapsed at the point where this contractor was working. Judgment against the defendant was reversed by the Supreme Court. This case merely states the general rule regarding the natural right which the owner has to lateral support. It has no relevancy or value to determine the issues in this case. The right to lateral support is conceded by the Appellant. The question here to be considered is not whether the owner of land has the right to lateral support, but whether the lessor in an ordinary lease of mining property over which he neither exercises supervision nor retains any right to supervise is liable for damages

resulting from the operation of the mine by a lessee due to causes which neither the lessee nor lessor could have foreseen.

Peters v. Bellingham Coal Mines, (Wash.) 21 Pac. (2d) 1024, is an action against a *lessee* who removed the coal from under plaintiff's property in such a manner as to cause the ground to subside. This damaged plaintiff's property. Judgment against the lessee was affirmed by the court. This case does not in any respect support Appellee's contention that the lessor is the one who is liable in such case.

Butte Copper and Zinc Company v. Amerman, (C. C. A. 9th) 157 Fed. (2d) 457. Appellee seriously tells the Court that the Amerman case is decisive of the issues in this case. The whole issue in this case is the question of the liability of the lessor for the underground mining operations conducted by a lessee. No such issue was raised in the Amerman case. The matter was not presented or argued. The position of the Anaconda Copper Mining Company and the Butte Copper and Zinc Company in the Amerman case was that there was no proof of any damage to Amerman's property resulting from any act of either of the defendants. In the instructions submitted in this case by the defendants and refused by the Court, the Court was asked to instruct the jury that unless it found that the Amerman property had been damaged by operations carried on *by the defendants, or either of them*, the verdict must be for the defendants. See Instructions, Transcript of Record on Appeal, in Butte Copper and Zinc Company and Anaconda Copper Mining Company v. Robert E. Amerman and E.

Aileen Amerman, Case No. 11224, Volume 2, Page 944; Instruction No. 11, page 944; Instruction No. 13, page 944; Instruction No. 21, page 947; Instruction No. 22, page 947; Instruction No. 27, page 949; Instruction No. 30, page 950, and Instruction No. 31, page 951. The language referred to in Appellee's brief on page nine relates to the closing sentence in the opinion of this Court in which it disposes of the request made at the conclusion of Defendant-Appellant's brief wherein they state "we respectfully submit that judgment for plaintiffs should be reversed with direction to enter judgment of dismissal on the merits."

TEXTS CITED BY APPELLEE.

1 American Jurisprudence, Section 37, page 527. This Section deals with the liability of an independent contractor. In quoting it the Appellee omits the portion which explains the application of the Section quoted. The portion omitted and marked by asterisks in Appellee's brief reads as follows:

> "*** Most of the cases which illustrate this doctrine relate to the effects of excavations made for the purpose of constructing or altering a building. But it is also applicable with respect to cases in which the damage complained of has been caused by an excavation made for a sewer or a railroad tunnel. There is authority for the doctrine that the liability of a landowner for acts of an independent contractor which have the effect of destroying or impairing the lateral support of the adjoining land may be referred to the principle that the duty of such landowner not to interfere with the right of lateral support is absolute in its quality. ***."

Clearly, this Section has nothing to do with the rule regarding the liability of a lessee of a mining claim operating under an ordinary mining lease for damage to the surface of the ground above the mine workings. American Jurisprudence does, however, deal specifically with this subject and supports Appellant's view. (36 American Jurisprudence, Section 185, page 407, quoted in the main brief of Appellant at pages 24 and 25).

American Law Institute, Restatement of Torts, Section 822, page 226. The quotation in Appellee's brief of the black letter text setting forth the general rule in Section 822 directly supports Appellant's contention. This Section states that "the actor," that is, the one who does the work, is liable for the damage. This Section relates to interference with the use of land. The rule governing the withdrawal of subjacent support will be found in Section 820 of this same text which says:

> "§ 820. Withdrawing Naturally Necessary Subjacent Support.
>
> "(1) Except as stated in § 818, a person who withdraws the naturally necessary subjacent support of land in another's possession or the support which has been substituted for the naturally necessary support is liable for the subsidence of such land of the other as was naturally dependent upon the support withdrawn, in the absence of a superseding cause or other reason for relieving him.
>
> "(2) A person who is liable under the rule stated in Subsection (1) is also liable for harm to artificial additions which results from such subsidence."

At page 207.

In discussing this rule the text goes on to say, at page 209:

> "*g. Persons subject to liability — liability of transferee.* The person liable under the rule stated in this Subsection is the actor who withdraws the naturally necessary support. It is immaterial whether, in respect to the supporting land, the actor be owner, possessor, licensee or trespasser. The owner or possessor of this land is not liable under the rule stated in this Section unless he was an actor in the withdrawal of support."

so that is is quite clear that the Section quoted in Appellee's brief did not relate to the specific question of the withdrawal of subjacent support. The Section which we have quoted above deals with this subject and supports Appellant's theory.

Appellee also refers to Section 837 of this same text, quoting from the black letter text. The author in commenting on this Section discusses the lessor's liability as follows:

> "*c. Lessor's Liability.* This Section merely states the conditions which must exist before a lessor of land is liable for harmful activities on the land when he has taken no active part in carrying on such activities (see § 834). A lessor of land usually has no control over the conduct of the lessee or the persons upon the leased land while the lessee is in possession of it, and therefore the lessor is not ordinarily responsible for the acts of the lessee or third persons thereon. Where, however, the lessor makes the lease under the condition stated in clauses (a) and (b), he subjects himself to liability."

At page 294.

Subsections (a) and (b) of Section 837 read as follows:

"(a) At the time when the lease was made, renewed or amended, the lessor consented to the carrying on of the activity, or knew that it would be carried on, and

"(b) the activity, as the lessor should have known, necessarily involved or was already causing such an invasion."

At page 293.

Neither one of these Subsections has any application to the present case.

2 Corpus Juris Secundum, Section 16, page 17. This section deals with the liability of an excavator for depriving adjoining land of lateral support. It states the general law, but does not deal with the liability for removing subjacent support by mining operations. Further on in this same text, Section 26, page 28, the author says:

> "The support of property superjacent to a mine is treated in Mines and Minerals § 278 (40 C. J. p 1195 note 96-p 1197 note 11)."

Appellant in its brief has quoted from 40 C. J., page 1195, (Appellant's main brief page 24). This quotation is directly in point and supports Appellant's view.

Lindley on Mines, Volume 3, Sections 818-819, pp. 2010-2014. This deals with the absolute right of the owner of the surface to support unless such right is expressly waived. With this rule we have no quarrel.

STATUTES CITED BY APPELLEE.

Section 6773 of the Revised Codes of Montana of

1935. This relates to the right of a coterminous owner to lateral and subjacent support from adjoining lands. This is the general law everywhere and is not peculiar to Montana.

Sections 8743 and 8748 of the Revised Codes of Montana of 1935 are maxims of jurisprudence which are universal and are not peculiarly the rules of law in Montana. These and many other maxims of jurisprudence are incorporated into the statutes of Montana. See Chapter 230, "Maxims of Jurisprudence," Revised Codes of Montana of 1935, Sections 8735 to 8772.

The United States statutes referred to in Appellee's brief merely refer to diversity of citizenship, which we concede.

CONCLUSION.

From this analysis of the cases, texts and statutes cited in Appellee's brief it is obvious that none of the cases are based upon similar facts, and that none of the texts or statutes relate to the specific question at issue in this case. We are here confronted with a question of liability of a lessor for the operation of its mine by the lessee. The Butte Copper and Zinc Company is a citizen of the State of Maine and leased a mine in Butte, Montana, to the Anaconda Copper Mining Company in the year 1917; that Company, lessee, operated the mine continuously from that date to the date of the trial. Several renewals of the lease were made, the last one being on June 1st, 1940, twenty-three years after the first lease was

made, and more than a year before any damage resulting from operations under the lease was disclosed. The damage resulted only from a slip of a fault, an unforeseen contingency. There is no negligence either alleged or proven by the Appellee. In fact Appellee states that negligence is not an issue in this case. The mining was done in a careful and workmanlike manner. When the ore was removed the stopes were timbered and then filled. No stoping or removing of ore was done within two hundred feet of the surface and in many places not within three hundred feet. The testimony on this point is uncontradicted. (R. 304-306).

It is clear from this analysis of the cases cited by Appellee in support of her contention that none are in point. It is a valid inference, therefore, that no such cases exist. In other words, the authorities are in complete agreement with Appellant's theory in this case.

Respectfully submitted,

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Service of the foregoing Reply Brief of Appellant

acknowledged, and copy thereof received this 1st

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